IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,

Plaintiff,

No. 2:00-CV-2041

vs.

PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual, AND JOHN HERKLOTZ, an individual,

Defendants.

BRIEF OF WRS, INC. IN OPPOSITION TO THE MOTION TO OPEN JUDGMENT FILED BY DEFENDANT, JOHN HERKLOTZ

I. INTRODUCTION

A. Standard of Review

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, a court may relieve a party of a final judgment in certain circumstances. Section 60(b)(1) addresses mistake, court error, or counsel's inadvertence. Section 60(b)(2) provides for relief based upon newly discovered evidence. Section 60(b)(3) provides for relief from judgment for circumstances where the misconduct of an adversary party impairs the moving party's ability to prosecute its case, in particular, when through the misconduct of the adversary and/or its counsel, relevant evidence requested in discovery is not properly disclosed. Stridiron v. Stireiron, 698 F.2d 207 (3rd Cir. 1983). F.R.C.P. 60(c)(1) imposes a mandatory requirement that Motions based on newly discovered evidence under Rule

60(b)(2) or misconduct of an adverse party under Rule 60(b)(3) be brought no later than one year from the date of the judgment.

F.R.C.P. 60(b)(6) allows the court to grant relief for "any other reason that justifies relief. This section and the first five sections of 60(b) are mutually exclusive in that if a party fails to timely request relief based upon newly discovered evidence under Section 60(b)(2) or for misconduct of party under 60(b)(3) then they may not seek relief more than one year after the judgment by resorting to subsection (6) Liljeberg v. Health Servs. Acquisition Corp. 486 U.S. 847 (108 S.Ct. 194, 100 L.Ed 2nd 855, 1988).

Furthermore, while Rule 60(b)(6) permits relief from judgments for reason not mentioned within the first five sections of rule 60(b), it is not intended to be a vehicle by which a moving party can introduce legal theories that were available and squarely implicated by the parties prior position. Polites v. United States, 364 U.S. 426, 5 L.Ed. 2nd 173, AS.Ct. 202 (1960); Marshall v. Board of Education of Bergenfield, New Jersey, 575 F.2d 417 (3rd Cir. 1978); Martinez-McBean v. Government Virgin Islands, 562 F.2d 908 (3rd Cir. 1977). Notably, Rule 60(b)(6) does not support relief where, in hindsight, the judgment may have been legally incomplete or erroneous, Stradley v. Cortez, 518 F.2d 488 (3d Cir. 1975), nor does 60(b)(6) authorize relief when, by reason of honest mistake, *a foriori*, a decided defense strategy, a party fails to produce stronger evidence of its position. Molenaar v. Government of Virgin Islands, *supra*. Neither, counsel's error, inadequate research, or mistake, justifies relief under Rule60(b)(6). Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001). Indeed, relief under Rule 60(b)(6) has been designated extraordinary and may be granted only upon a showing of "exceptional circumstances". Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977); Mayberry v. Maroney, 529

F.2d 332, 337 (3d Cir. 1976); Stradley v. Cortez, 518 F.2d 488, 494 (3d Cir. 1975). Finally, while a request under 60(b)(6) must be presented within a reasonable time from the date of the judgment, one year is considered to be a reasonable time absent exceptional circumstances. Ackermann v. United States, 340 U.S. 193, 202, 71 S. Ct. 209, 95 L. Ed. 207 (1950); Klapprott v. United States, 335 U.S. 601, 613-14, 69 S. Ct. 384, 93 L. Ed. 266 (1949); 11 Charles Alan Wright et al., Federal Practice & Procedure § 2864, at 357 (2d ed. 1995). Simply stated, in light of the applicable law, Defendant John Herklotz ("Herklotz") cannot establish a proper basis for opening or vacating the judgment in favor of WRS. Inc. ("WRS") on February 20, 2007.

B. Factual and Procedural Background

On May 6, 2008 Herklotz moved under F.R.C.P 60(b) for reconsideration of the judgment entered in favor of WRS on February 20, 2007. Although Herklotz hints at Sections 60(b)(2) and 60(b)(6), neither his motion nor brief clearly identifies the specific sections of Rule 60(b) upon which his motion is based. Yet, it is clear that his motion is patently untimely having been filed over one year from the date of the entry of the Order contrary to Rule 60(c)(1) and, thus, is without merit. Even if the motion is considered to be timely filed, Herklotz's motion lacks substantive merit and should nevertheless be denied.

Both the timeliness and the merits of Herklotz's motion must be considered in light of the strategy Herklotz pursued in defense of WRS' claim. Incredibly, during the 5 ½ years that preceded close of formal discovery that was extended to January 31, 2006 pursuant to Herklotz's request, (Doc.76), Herklotz took no discovery from Defendants, Plaza Entertainment, Inc. ("Plaza"), Eric Parkinson ("Parkinson") or Charles von Bernuth ("von Bernuth"). This was a considered strategic choice made by Herklotz for defending against the claims of WRS as revealed in his Motion for Summary Judgment or, alternatively, Motion for Partial Summary Judgment ("Motion for Summary Judgment") filed on February 24, 2006 (Doc.81) and Brief (Doc.80).

Herklotz's Motion set forth two arguments in his defense. First, Herklotz contended that his liability was excused by the Services Agreement. Second, Herklotz argued that WRS' records were inherently unreliable so that WRS could not prove its damages. Herklotz contention was stated concisely in Paragraph 44 of his Motion for Summary Judgment as follows:

> WRS' Proof of Damages is muddled and confused due to poor record keeping, failure to produce documentation, inability to produce documentation because records were never maintained in the first instance.

This argument clearly demonstrates that Herklotz's defensive strategy was to rely on WRS' records alone to show that the records were inherently unreliable and consequently insufficiently probative. Herklotz apparently decided that it was not necessary to obtain any discovery from Plaza or Parkinson to challenge or contradict WRS' records. To argue now, having had more than more than five years to take discovery from Plaza, Parkinson and von Bernuth that the evidence possessed by von Bernuth, Plaza or Parkinson qualifies as "newly discovered" is simply specious. Any lack of knowledge was the result of his own deliberate decision not to ask for that information in discovery. As such, the evidence that Herklotz now characterizes as "new" does not qualify as newly discovered evidence under F.R.C.P. 60(b)(2). Furthermore, even though F.R.C.P. 60(b)(3) allows for relief based on misconduct of an adversary party, Herklotz's lack of knowledge of the "new" evidence was not caused by misconduct by Attorney John

Gibson, counsel for von Bernuth, Plaza or Parkinson, but by his own decision not to timely pursue discovery.

Since Herklotz's Motion for Reconsideration, if based on the "new" evidence and Gibson's misconduct, are appropriately addressed under Rule 60(b)(2) and Rule 60(b)(3), then Rule 60(b)(6) does not provide a separate basis for relief for those reasons. Additionally, Rule 60(b)(6) does not support Herklotz's contention that his liability cannot be determined because the judgment against Plaza has been opened. Herklotz's motion was not filed within a reasonable time, he failed to raise this issue when appropriate earlier in the litigation and his contention is substantively incorrect because the terms of Herklotz's Guaranty enabled the court to fully and completely adjudicate his several liability notwithstanding the status of Plaza's adjudication. His concern over inconsistent judgments is misplaced. Accordingly, Herklotz's Motion for Reconsideration must be denied.

II. Herklotz' Motion for Reconsideration Should be Denied Because it is Untimely.

A. Herklotz Filed his Motion Premised on Newly Discovered Evidence and Gibson's Misconduct Too Late.

To determine whether Herklotz's Motion for Reconsideration was timely, the court must determine which sections of Rule 60(b) are most applicable to the assertions made in the motion. Virgin Records Am., Inc. v. Sparano, 245 Fed. Appx. 200, 2007 U.S. App. LEXIS 19871 (3d Cir. N.J. 2007). Section 60(b)(2) provides for relief based upon newly discovered evidence. To establish the basis for relief under this section the movant must show that the evidence claimed to be "new" is (1) material and not merely cumulative, (2) could not have been discovered prior to trial through the exercise of reasonable diligence, and (3) would probably have changed the outcome of the trial. Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983).

Herklotz's allegations appear to be an attempt to meet these criteria. He suggests that the information placed in the record by von Bernuth's Motion for Reconsideration is "new" evidence that impacts on the award against him. (Paragraph 4, Herklotz's Motion for Reconsideration). He asserts that this evidence would "effect the judgment entered against him." (Paragraph 12, Herklotz' Motion for Reconsideration). He asserts that the evidence "presented at trial may substantially reduce the judgment against him." (Paragraphs 11 and 22, Herklotz's Motion for Reconsideration). Herklotz asserts that the evidence is "new to Herklotz and not only cumulative." (Paragraph 16, Herklotz's Motion for Reconsideration). While Herklotz does not expressly lodge his request for relief under Rule 60(b)(2), his allegations clearly intend to meet the Rule 60(b)(2) elements. Accordingly, it is the section most applicable to Herklotz's contention about the "new" evidence.

Herklotz also asserts that his ignorance of the information brought into the case by von Bernuth's Motion for Reconsideration was caused by the misconduct of Attorney John Gibson (Paragraphs 19, 20 and 23, Herklotz' Motion for Reconsideration). Rule 60(b)(3) provides for relief from a judgment for circumstances where the misconduct of an adversary party impairs the moving party's ability to prosecute its case. In particular, when misconduct of the adversary and/or its counsel, results in the failure to disclose relevant evidence requested in discovery. Stridiron v. Stirdiron, *supra.*

Rule 60(c)(1) imposes a mandatory one year time limit on motions for relief from judgment based upon 60(b)(2) and (3). Judgment was entered in favor of WRS on

February 20, 2007. Herklotz moved to vacate the judgment over a year later on May 6, 2008. Accordingly, to the extent that Herklotz has based his request for relief on "newly discovered evidence" or Gibson's "misconduct", it is clear that Herlotz' request is patently untimely and cannot be addressed by the court.

In his motion, Herklotz vaguely mentions F.R.C.P 60(b)(6) in support of his request for relief suggesting that an allegation more appropriately lodged under Rule 60(b)(2) and (3) might provide him a right to relief under Rule 60(b)(6). Rule 60(b)(6) provides that the court may grant relief for "any other reason that justifies relief." However, as pointed out above, if a party fails to timely request relief based upon newly discovered evidence under Section 60(b)(2) or for misconduct of party under 60(b)(3), they may not seek relief more than one year after the judgment by resorting to subsection (6). Liljeberg v. Health Servs. Acquisition Corp. 486 U.S. 847 (108 S.Ct. 194, 100 L.Ed 2nd 855, 1988). Thus, having failed to timely assert these issues under the appropriate sections of Rule 60(b), Herklotz is barred from relying upon Rule 60(b)(6) as a basis to overcome this lack of timeliness.

Furthermore, to the extent that Herklotz relies independently on Rules 60(b)(6) to assert newly discovered evidence or Gibson's "misconduct" as a premise for his relief, his request is nevertheless untimely. A motion under Rule 60(b)(6) filed more than a year after the filing of judgment is generally untimely unless "extraordinary" circumstances excuse the parties' failure to proceed sooner. Ackerman v. United States, supra.

It is clear that Herklotz had an adequate opportunity to timely raise these matters within the mandatory time frame set by rule 60(c)(1) or within the one year reasonable time standard applicable to 60(b)(6). During the year following the entry of the judgment on February 20, 2007, Herklotz's counsel knew of Gibson's "misconduct" and of Parkinson's and Plaza's claim to the evidence that Herklotz now characterizes as "newly discovered." Herklotz's motion only mentions von Bernuth's Motion for Reconsideration filed on October 16, 2007 (Doc. 150) as the source of this information. However, Parkinson's assertions were on record on June 5, 2007 when the court docketed Parkinson's letter that outlined both Gibson's lack of communication with his clients and Parkinson's contention that evidence was available that allegedly would more accurately calculate the amount of damages sought by WRS. (Doc. 148). Undoubtedly, Herklotz had adequate opportunity to move for reconsideration based on "newly discovered evidence" and "adversary misconduct" within the time required by F.R.C.P. 60(c)(1) or within a reasonable time even if properly relying upon F.R.C.P. 60(b)(6). Moolenaar v. Government of Virgin Islands, *supra*.

B. Herklotz' Motion contending that the judgment violates surety law and might result inconsistent judgments was filed too late.

For the first time in this litigation, Herklotz asserts that as a surety he cannot be held liable for more than Plaza is determined liable. (Paragraph 14, Herklotz' Motion for Reconsideration). This argument suggests either that Plaza's liability must be determined before Herklotz's liability can be adjudicated or at least simultaneously. As set forth below this contention is legally erroneous. However, the Court cannot properly address the merits because the contention is untimely presented.

Again, Herklotz fails to specify the section of Rule 60(b) under which he believes this contention entitles him to relief. Presumably, Herklotz's argument relies on F.R.C.P. 60(b)(6) as justifying relief. Yet, as set forth above, in order to be timely, Herklotz must demonstrate "extraordinary" circumstances that would excuse his failure to have moved the court on this premise prior to the one year following the entry of judgment. He has failed to do so.

Herklotz suggests that the possibility of Plaza being determined liable for an amount different than Herklotz did not arise until the court granted Plaza's Motion to Open in March of 2008. On the contrary, this potential existed throughout this litigation. If is liability was contingent upon an adjudication of Plaza's liability, his argument should have been asserted in Herklotz's Answer as an Affirmative Defense. It was not. Herklotz should have asserted this argument, in his own Motion for Summary Judgment or, alternatively, Partial Summary Judgment, but did not. Herklotz should have made this argument in defense of WRS' Motions for Summary Judgment as to liability and damages, to which Herklotz responded before any judgment was entered against Plaza. Herklotz did not raise this argument during the colloquy conducted by the court on January 31, 2007 in which the court specifically addressed each element of the damages claim.

Moreover, the possibility that the Plaza judgment might be opened arose on January 28, 2008 when Parkinson and Plaza filed their motions seeking reconsideration of the default judgments. (Doc. 179 ,180). Herklotz neither responded to those motions or moved to separately assert that resolution of the Plaza motion would impact the judgment entered against him. In fact, Herklotz had over twenty (20) days from January 28, 2008 until February 20, 2008, the one year anniversary of the entry of judgment, within which to file a motion on the basis he now asserts. Certainly, twenty days is a sufficient time for Herklotz to have formulated and asserted the legal position that the judgment against him should not stand in the event the Plaza judgment was opened. Twenty days is the length of time provided by Federal Rule 12 for a Defendant who has just been served to digest, analyze and respond to all factual and legal contentions asserted in a Complaint. Clearly, in light of the significance of the judgment, and the apparent clarity with which Herklotz now asserts this position, he had sufficient incentive and apparent legal basis to timely move the Court. But, Herklotz did not do so.

Indeed, Herklotz waited over six weeks from the date the Plaza judgment was opened to assert this legal position. Not only does this delay confirm that his Motion for Reconsideration is untimely, the delay clearly undermines Herklotz's "emergency" characterization of his motion. In light of the past opportunities to bring this position to light during this litigation, Herklotz has not shown any "extraordinary" circumstances excusing his untimely presentation at this juncture. Accordingly, since all of Herklotz's contentions are untimely, the Court must deny Herklotz's Motion for Reconsideration.

III. Herklotz Motion Should Be Denied Because It Fails To Set Forth Any Meritorious Basis Upon Which 60(B) Relief Can Be Granted.

A. Introduction.

In addition to being untimely, a proper analysis of the Herklotz allegations demonstrates that his motion does not present a valid basis for the court to provide relief on the merits. During this litigation, Herklotz has been the most active defendant. From February 2001 when he filed his first Answer until the last extension of discovery deadline on January 31, 2006, Herklotz actively pursued discovery from WRS. Yet, as pointed out in the Introduction above, Herklotz, during this five and a half year period, made no attempt to obtain any discovery from Plaza, Parkinson or von Bernuth.

The decision not to pursue discovery against these parties seems particularly surprising in light of the newly asserted legal theory that his liability cannot exceed that of Plaza. One would expect that in the interest of limiting his liability, Herklotz would have explored the possibility that Plaza had information that could impact the calculation of damages. However, as pointed out in the Introduction, Herklotz's defensive strategy, as elaborated in his Motion for Summary Judgment was to rely solely on WRS' records to establish that WRS' records were inherently unreliable and thus insufficiently probative. When viewed in this light, obtaining information from Plaza that might have established that some amount was due to WRS would have undermined his defensive strategy.

B. Herklotz Motion does not establish a substantive basis for relief from the Judgment based on newly discover evidence or Gibson's misconduct..

To qualifying as newly discovered evidence under Rule 60(b)(2), Herklotz must demonstrate that the evidence in question could not have been discovered prior to entry of judgment by the exercise of reasonable diligence. Bohus v. Belhoff, 962 F.2d 919, (3rd Cir. 1991). Herklotz has admitted in his Motion for Reconsideration that Parkinson possessed the information throughout the litigation. This is apparent from Parkinson's letter of June 5, 2007 in which Parkinson claimed to have an audit from as far back as August, 1999.(Doc.148).

Under Rule 60(b)(2) the term "newly discovered evidence" refers to evidence of a fact in existence at prior to the date of the judgment of which the aggrieved party was excusably ignorant. United States v. 27.93 Acres of Land, 924 F.2d 506 (3rd Cir. 1991). Pre-judgment ignorance of the evidence is not excusable if the party has never sought to obtain it in pre-trial discovery H.K. Porter Co. v. Goodyear Tire & Rubber Co., *supra*.

See also: Travelers Cas & Sur Co. v. Crow & Sutton Assoc. 228 F.3rd 25 2005 (S.D. NY 2005) denying a motion alleging “newly discovered evidence” where the party failed to exercise his right to obtain information through discovery and Wadell v. Hemerson, 329 F.3rd 1300 (11th Cir. 2003), denying a motion where the court indicated that failing to depose a party who had relevant information that could have been obtained by a party by a deposition taken during discovery was not “newly” discovered evidence.

As demonstrated above, the exercise of reasonable diligence in the discovery process by Herklotz against Parkinson, von Bernuth and Plaza would have produced the evidence that Herklotz claims qualify as “newly discovered.” At a minimum, Herklotz cannot claim to have exercised reasonable diligence with respect to evidence possessed by Parkinson or Plaza. Having not asked for it during discovery, Herklotz cannot now complain that he did not know about it.

Furthermore, having failed to ask Gibson for the information through discovery, he cannot attribute his ignorance of it to Gibson’s “misconduct”. Accordingly, Herklotz was not “excusably ignorant” of the claimed “new “evidence. Rather, under his choice of defense theory, information possessed by Plaza and Parkinson and possibly von Bernuth as to the amount of the debt owed to WRS was of no concern to Herklotz. Accordingly, his ignorance of this information was based upon his counsel’s strategic choice and cannot justify relief under Rule 60(b).

C. Herklotz reliance on surety law and the concern over inconsistent judgments is substantively without merit.

Paragraph 14 of Herklotz’s motion asserts that because the court has opened the default judgment against Plaza it would be fundamentally unfair and create judicial inconsistency if the Herklotz judgment was not opened. It appears that Herklotz contends that if the "newly discovered" evidence is considered, Plaza might be held to owe less than the amount for which Herklotz has been adjudicated liable. This, Herklotz argues, is contrary to applicable law citing Exton Drive-In, Inc. v. Home Indem. Co., 261 A.2d 319 (Pa. 1969); Rafferty v. Klein, 100 A. 945 (Pa. 1917) cited by McShain v. Indemnity Ins. Co. of North America, 12 A.2d 59 (Pa. 1940); East Crossroads Center, Inc. v. Mellon-Stuart Co., 416 Pa. 229 (1969). Since this issue does not fall within circumstances identified in Rule 60(b)(1)-(5) it can only be addressed, if at all, under Rule 60(b)(6).

Herklotz's position that the possibility now exists that Plaza could ultimately be found liable in an amount different that Herklotz has been determined liable suggests that the law prohibits an adjudication of Herklotz's liability absent a prior adjudication as to Plaza. Although this position has a superficial appeal, the proper analysis of the law, and in particular Herklotz's undertaking as guarantor, demonstrates that it is incorrect. Indeed, Herklotz's late introduction of this theory coupled with his dramatic claim that fundamental fairness requires its consideration, magnifies its glaring absence from the defenses Herklotz asserted to the entry of judgment. Cleary, this is an instance of second guessing and an improper effort to try a new previously unconsidered legal theory. Polites v. United States, *supra*. Marshall v. Board of Education of Bergenfield, New Jersey *supra*; Martinez-McBean v. Government Virgin Islands. *supra*.

Herklotz new theory, although not viable, should have been asserted previously and is now waived. Chainey v. Street, 2008 U.S. App. LEXIS 8362 (3d Cir. Pa. Apr. 14, 2008. Most significantly, Herklotz did not make this legal argument in his response to WRS' Motions for Summary Judgment as to Liability or Damages even though no judgment had been entered against Plaza at that time. Herklotz also did not raise this contention in opposition to the WRS' Motion under Rule 54(b) seeking to certify the February 20, 2007 judgment as sufficiently final to support the appeal. WRS filed its 54(b) Motion on November 2, 2007. (Doc. 161). Herklotz was directed to file a response to that motion on or before November 26, 2007. Herklotz did not raise the issue at that time. Even after Plaza filed its Motion to open the default judgment on January 28, 2007, Herklotz made no effort to raise this contention even though he had over twenty days to do so before the one year anniversary of the February 20, 2007 judgment. In fact, on March 27, 2008 after the Plaza judgment was opened by the Court, Herklotz sought the benefit of the retro-active application of the certification of finality by asking that the February 8, 2008 order apply to the entry of judgment on February 20, 2007. Certainly it would have been appropriate to mention this new legal theory at that time, but Herklotz did not. Accordingly, WRS submits that Herklotz has had an, adequate, full and fair opportunity to raise issue prior to February 20, 2008 and did not. Asserting it at this late date in the guise of the Rule 60(b)(6) motion is improper and does not provide a legitimate basis for the court to relieve him of the judgment.

Even if the Court were to conclude that Herklotz's motion properly raised this issue as a new legal theory, the proposition that Herklotz's judgment cannot stand if Plaza has not been adjudicated liable, is not meritorious. The cases cited by Herklotz did not deal with the situation where the surety had agreed to be unconditionally and directly liable for the principal's debt. As recognized by the Supreme Court of the United States, the cases merely stand for the proposition that if the principal is judicially determined not to be liable, the surety is not liable. Newman Greene, Inc. v. Alfonzo Lorraine, 490 US 826, 109 S. Ct. 2218, 104 L. Ed.2d 893 (1989).

The cases do not address the ability of a Plaintiff to pursue one of multiple obligors and the court's ability to fully and completely adjudicate one obligor's claim in absence of an adjudication as to the other obligor's liability. Courts usually face this issue prior to the entry of judgment when it is contended that a party is indispensable to the adjudication. Where a guarantor has agreed to be severally liable, the court may grant full and complete relief in absence of the co-obligors. Janney Montgomery Scott v. Shepard Niles, Inc., 113 F.3d 399 (1993); General Refractory Co. v. First State Insurance Co., 500 F.3d 306 (3rd Cir. 2007). Thus, despite the bold statements contained in Herklotz' motion, separate adjudications against parties who are severally liable is not improper and, depending on the circumstances, could properly result in the entry of judgments in different amounts.

At the outset of Herklotz's relationship with WRS he agreed that his liability was unconditional, direct and that WRS could pursue him without first resorting to Plaza. Like the guarantors in Janney Montgomery Scott v. Shepard Niles, Inc. and General Refractory Co. v. First State Insurance Co., Herklotz was severally liable to WRS. As a matter of law and as a matter of contract, his liability was not dependant upon a prior adjudication of Plaza's liability. The court could and did fully adjudicate his liability without the participation of Plaza. Thus, at its outset, Herklotz's undertaking contemplated the possibility that separate actions could be maintained against him and Plaza. In this respect, the potential for judgments in differing amounts arose not because of the order opening the default judgment against Plaza but because Herklotz undertook such liability

The real issue is not whether judgments are entered in different amounts, but whether the party against whom the judgment is entered had a full and fair opportunity to defend against his liability. Here, as pointed out above, Herklotz had a full and complete opportunity to discover the information that he felt necessary to his defense. In fact, Herklotz filed his own Motion for Summary Judgment. Herklotz had an opportunity to defend against the motions for summary judgment as to liability and damages filed by WRS. In all his filings Herklotz never claimed that the court could not adjudicate WRS' claim against him if judgment had not been entered against Plaza. For these reasons, WRS submits that Herklotz cannot complain now that the judgment as to Plaza has now been opened.

Notably, it is possible that WRS could proceed in this matter without finally having adjudicated judgment as to Plaza, Parkinson and von Bernuth. The lack of the judgment would not impair Herklotz's remedy of contribution against the principal obligor or co-guarantor. See, for instance, Newman Greene, Inc. v. Alfonzo Lorraine, *supra*. where the United States Supreme Court determined that suit against one guarantor on his several liability was not prejudiced by the dismissal from the action of the other co-obligors citing the right of the guarantor who was adjudicated liable to pursue his claims for contribution against the other parties as his legitimate remedy. Of course, Herklotz's contribution claim is not ripe unless and until he pays more than his share of the debt that he guarantied. Keystone Bank v. Flooring Specialists, Inc., 513 Pa. 103, 518 A.2d 1179 (1986).

Herklotz's assertion that failure to open the judgment would run afoul of court's desire to avoid inconsistent judgments is misplaced. The United States Supreme Court in

Frow v. DeLaVega, 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872) established the rule against inconsistent judgments. There, a default was entered against one of several defendants on claim based on a joint obligation. When the participating defendant was exonerated from liability, the court concluded that the default judgment could not stand as to the non-participating defendant.

The opposite occurred in this case. Herklotz, the participating defendant, fully and completely, but unsuccessfully, defended against WRS' claim of separate liability employing his chosen defensive strategy. Because, Herklotz's liability was both joint and several under his guaranty, concern of inconsistent judgments is not implicated. In Re: Uranium Anti Trust Litigation, 617 F.2d 1248 (7th Cir. 1980) and is not a basis for Rule 60(b)(6) relief.

IV. Conclusion

Having unsuccessfully litigated this case for over six years, Herklotz, in hindsight, has determined that perhaps a different strategy should have been pursued. Plaintiff WRS played no part in causing Herklotz to pursue the strategy that he and his counsel undertook. WRS did not interfere with Herklotz's opportunity to undertake discovery from von Bernuth, Parkinson or Plaza, nor did Attorney John Gibson, despite his inattentiveness to the case after March of 2006.

Herklotz chose to defend his liability by challenging the probative value of WRS' records and sought to establish its lack of reliability of those records based solely upon WRS' records. Herklotz could have, but did not, attempt to obtain contradictory information or any information from Plaza. In fact, when called upon to present evidence to contradict the calculation of damages during the Court's colloquy on WRS' Motion for

Judgment as to Damages on January 31, 2007, Herklotz's counsel reasserted Herklotz's contention that WRS' records could not prove damages. Counsel presented no additional or contrary data, not because John Gibson failed to disclose it, not because John Gibson was inattentive to his clients, but because Herklotz' chosen strategy was not to pursue Parkinson or Plaza for that information.

Herklotz has had a full and complete opportunity to litigate his defense to the obligation asserted by WRS. No "newly discovered" evidence as that term is defined in Rule 60(b)(2) or adversary party misconduct as that term is defined in Rule 60(b)(3), caused Herklotz to be in the position that he now occupies. Nor does his last minute reliance upon inapplicable surety law concepts or his ill-conceived assertion of the inconsistent judgments provide a basis for this court to open the judgment entered on February 20, 2007.

Accordingly, Plaintiff, WRS, Inc., respectfully requests that the Court deny the relief requested by John C. Herklotz in his Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of WRS, Inc.'s Brief in Opposition to Defendant Herklotz's Motion to Open Judgment was delivered via first-class mail, postage pre-paid on the 21st day of May, 2008, to the following:

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